No. 01-1774 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

STATE OF MARYLAND,

Petitioner

v.

DWAYNE ANTHONY DRURY,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Review is unwarranted because the opinion of the Court of Appeals of Maryland correctly applies this Court's decision in *Rhode Island v. Innis*, 446 U.S. 291 (1980). Resolution of this case requires nothing more than the application of settled law to a set of facts unique to this particular case. Moreover, contrary to Petitioner's claim, there is no conflict in the rulings of the federal and state courts as to the application of *Innis* in cases where a suspect in custody is shown or informed of evidence of a crime.

STATEMENT OF THE CASE

Mr. Drury was charged by indictment with the offenses of second degree burglary, fourth degree burglary, and theft of property over the value of $300. Prior to trial he moved to suppress statements that he made to the police.

The only witness to testify at the suppression hearing was Officer Mark Whaley of the Centreville police department. On July 14, 1996, Officer Whaley went to the Hillside Market in response to a burglary report. (Pet., App.2a, 45a). The owner of the market informed Officer Whaley that he had found a tire iron behind the counter near the cash register. (Pet., App. 45a-46a). Investigation revealed that the rear door had been pried open and that the tire iron may have been used to gain entry. (Pet., App.2a, 46a). Adult magazines, some of which were still wrapped in plastic, cartons of cigarettes, bottles of liquor, and scratch-off lottery tickets were missing. (Pet., App.2a-3a, 46a).

Later that night, a deputy sheriff told Officer Whaley that he had seen two individuals acting suspiciously near an alleyway at the corner of Commerce and Water Streets. (Pet., App.46a). At 3:00 a .m. on July 15, Officer Whaley went to that location, which was not far from the Hillside market, and looked through the trash. After opening one of the trash bags, he found several adult magazines, some of which had been opened and some of which still had the plastic wrap intact, and a liquor bottle. (Pet., App.46a-47a).

Officer Whaley next interviewed Karl Kirby, a suspect in the case. Kirby implicated Mr. Drury. (Pet., App.47a). Officer Whaley then went to Mr. Drury's home, "picked Mr. Drury up for questioning," and brought him to the police station. (Pet., App.3a, 47a-48a). Before advising Mr. Drury of his *Miranda* rights, Officer Whaley placed the tire iron and the trash bag containing the magazines on a desk in front of Mr. Drury and then told Mr. Drury that the items were going to be processed for fingerprints. (Pet., App.3a-4a, 47a, 49a). Mr. Drury responded by making incriminating statements about the tire iron and the magazines. (Pet., App.3a, 47a-49a). Officer Whaley then advised Mr. Drury of his *Miranda* rights. Mr. Drury made no further statements. (Pet., App.3a, 48a-49a).

On direct examination, Officer Whaley testified in relevant part as follows:

> Q. After you talked with Mr. Kirby, did you go visit Mr. Drury?
>
> A. Yes. I picked Mr. Drury up for questioning, at which time I proceeded to show Mr. Drury the evidence which was retrieved. In showing Mr. Drury the tire iron that was retrieved from the actual incident area, Mr. Drury said, well, my

fingerprints could be on that and are on hundreds of tire irons around Centreville, okay, and picking up the trash bag in which the magazines were located in, Mr. Drury proceeded to tell me the contents of the bag prior to me even stating what was in the bag myself.

Q. What did he tell you?

A. He said that he had touched the magazines that were in that bag.

Q. Both the opened and the unopened magazines?

A. Yes, sir.

Q. By unopened you mean, so we're all on the same wavelength, the girlie magazines with the plastic wrapper around them?

A. Yes, sir.

(Pet., App.47a-48a).

On cross-examination, Officer Whaley testified in relevant part as follows:

Q. Corporal Whaley, you said you questioned Mr. Drury on July 15th?

A. Mr. Drury wasn't actually questioned.

Q. What did you do with Mr. Drury? Did you speak to him?

A. I brought Mr. Drury in for questioning, and upon --

Q. Okay. Hold it. You took Mr. Drury and took him to the Centreville Police Department?

A. That's correct.

Q. Okay. So you didn't question him on the street or at the apartment?

A. No, sir.

Q. And you brought him into the Centreville Police Department and where did you talk to him then?

A. Within the department.

Q. Within the department. And did you Mirandize Mr. Drury?

A. Yes, I did.

Q. Okay. Did he give any statements after being Mirandized?

A. No, he did not.

Q. These statements you say that he made, what did you do before he made any statements? What actions did you take with this physical evidence?

A. I was presenting the evidence that was going to be used for the questioning.

Q. So you took the evidence out and put it in front of Mr. Drury?

A. I put it up on the desk in front of myself.

Q. We're talking about the tire iron you put in front of him?

A. Yes, sir.

Q. And the magazines in the bag, the physical evidence from this robbery?

A. Yes, sir.

Q. And did you tell Mr. Drury that you were going to send this evidence off for fingerprints?

A. As I recall, yes, sir.

Q. You told him all that before you Mirandized him?

A. Yes, sir.

Q. And that's when you claim that he made some statement about his fingerprints possibly being on these physical items?

A. Yes, sir.

Q. And then once he was Mirandized, he didn't want to talk to you?

A. No, sir.

(Pet., App.48a-49a).

Mr. Drury argued that Officer Whaley's conduct constituted interrogation within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966), because the officer should have known that his words and actions were likely to elicit an incriminating response. (App.50a-52a). The trial judge disagreed and denied the motion to suppress. (Pet., App. 51a-53a). A jury convicted Mr. Drury on all three counts. (Pet., App.5a).

On appeal, the Court of Appeals of Maryland found that Officer Whaley's words and conduct were the functional equivalent of interrogation within the meaning of *Rhode Island v. Innis*, 446 U.S. 291 (1980). (Pet., App.7a-8a). The Court of Appeals concluded that "the officer should have known, in light of his having told petitioner that he was being brought in for questioning, that putting the evidence before petitioner and telling him that the items were going to be fingerprinted was reasonably likely to evoke an incriminating response from him." (Pet., App.8a). Accordingly, the Court of Appeals held that Mr. Drury's statements should have been suppressed. (Pet., App.13a).

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CORRECTLY APPLIES *RHODE ISLAND V. INNIS*, 446 U.S. 291 (1980).

In *Innis*, this Court addressed the meaning of "interrogation" under *Miranda*. The Court first reviewed the police practices that had evoked *Miranda's* concern about the coerciveness of the "interrogation environment." 446 U.S. at 299, quoting

Miranda, 384 U.S. at 457. Those practices included a variety of "psychological ploys, such as to 'posi[t]' 'the guilt of the subject,' to 'minimize the moral seriousness of the offense,' and 'to cast blame on the victim or on society.'" 446 U.S. at 299, quoting *Miranda*, 384 U.S. at 450. While none of these practices involves express questioning, the Court found that any of them, when coupled with the "'interrogation environment,'" is likely to "'subject the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." 446 U.S. at 299, quoting *Miranda*, 384 U.S. at 457-58. Accordingly, these "techniques of persuasion," in a custodial setting, "amount to interrogation." 446 U.S. at 299.

The Court concluded in *Innis* that "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." 446 U.S. at 300-01. The Court explained the phrase "functional equivalent" of interrogation as including "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 301 (footnotes omitted). While this definition "focuses primarily upon the perceptions of the suspect, rather than upon the intent of the police," *id.*,

> [t]his is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police

> practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

446 U.S. at 301 n.7. *See also Arizona v. Mauro*, 481 U.S. 520, 526-27 (1987).

Here, it is readily apparent that Mr. Drury was being "interrogated" within the meaning of *Innis* at the time of his incriminating statements to Officer Whaley. Although Officer Whaley had not engaged in any express questioning of Mr. Drury at the time those statements were made, Officer Whaley should have known that placing the tire iron and the trash bag containing the stolen magazines on the table in front of Mr. Drury and telling Mr. Drury that he was "going to send this evidence off for fingerprints" was reasonably likely to elicit an incriminating response. As the Court of Appeals observed, an incriminating statement was readily foreseeable:

> Petitioner had been brought to the police station for the express purpose of questioning and, in fact, had been told so by Corporal Whaley. The police were not engaged in routine booking procedures; they were not required by any Maryland rule or procedure to read any document (other than the *Miranda* rights) to petitioner. Nonetheless, the officer placed the tire iron and trash bag containing the stolen magazines on the table before petitioner before advising him of his *Miranda* rights. The officer told petitioner that he was going to send the evidence to be examined for fingerprints. Moreover, the officer testified that he "was presenting the evidence that was going to be used for questioning."
>
> It appears to us that the only reasonable conclusion that can be drawn from the foregoing facts is that the officer should have known, in light of his having told petitioner that he was being brought in for questioning, that putting the evidence before petitioner and telling him that the items were going to be fingerprinted was reasonably likely to evoke an incriminating response from him. The only plausible explanation for the

> office's conduct is that he expected to elicit a statement from petitioner.

(Pet., App.8a).

Petitioner suggests that "as a practical matter, the court below has created a per se rule that any time a police officer shows a suspect evidence of a crime the gears of *Miranda* are engaged." Pet.5.[1] The decision below creates no such rule. The Court of Appeals begins its opinion by stating that "[t]he question we must decide in this case is whether, *under the circumstances presented herein*, the statements that petitioner made prior to being advised of his *Miranda* rights must be suppressed because the officer conducted the functional equivalent of interrogation." Pet., App.1a-2a (emphasis added). The Court of Appeals concluded that Officer Whaley "should have known, in light of his having told Petitioner that he was being brought in for questioning, that putting the evidence before petitioner *and telling him that the items were going to be fingerprinted* was reasonably likely to evoke an incriminating response from him." Pet., App.8a (emphasis added). At no point in the opinion does the Court of Appeals even suggest that showing a suspect evidence of a crime is always the functional equivalent of interrogation. To the contrary, the Court of Appeals carefully noted that "whether police conduct was tantamount to interrogation depends on the facts and circumstances of the particular case" and that in this case Officer Whaley "did not merely place the tire iron and stolen magazines

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[1]Petitioner concedes that Mr. Drury was in custody for *Miranda* purposes when Officer Whaley brought him to the police station. Pet. 10 n.2

before him. The officer told Petitioner that they were going to process the items for fingerprints." Pet., App.10a-11a. Thus, the State's claim that the decision below creates "a per se rule" is simply untrue.[2]

Petitioner also accuses the Court of Appeals of "[f]ocusing on Corporal Whaley's subjective intent." Pet. 4. Again, this contention is belied by the record. The test applied by the Court of Appeals was not the officer's intent, but, rather, whether the officer should have known that his words and conduct were reasonably likely to elicit an incriminating response from Mr. Drury. Pet., App.6a, 7a, 10a, 11a, 13a. At two points in the opinion, while distinguishing this case on its facts from earlier Maryland decisions, the Court of Appeals observed that "[t]he only reasonable explanation for [Corporal Whaley's] conduct is that he intended to elicit a statement from petitioner" and that "Corporal Whaley's actions were aimed at

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[2]The Court of Appeals distinguished this case from *Vines v. State*, 285 Md. 369, 402 A.2d 900 (1979). Pet., App.10a-11a. Vines was arrested in his home during the execution of a search warrant and taken to the police station. There, Vines was advised of his *Miranda* rights, and he invoked his right to remain silent. He was then booked and taken to the roll call room, where, displayed on a table, were drugs that the police seized pursuant to the warrant. As required by the Maryland Rules of Procedure, Vines was given a copy of the warrant, including an inventory of the seized property, and he was told that "this is what was recovered from his house during the raid." Vines then admitted that "it was his stuff."

The Court of Appeals held that giving the inventory to Vines, in compliance with the Maryland rules, together with the simple factual statement linking the drugs to the inventory, was not tantamount to interrogation within the meaning of *Miranda*. 285 Md. at 377, 401 A.2d at 904-05; Pet., App.10a-11a. The fact that the Court of Appeals distinguished *Vines*, rather than overrule it, is further evidence that the Court of Appeals has not created a per se rule that *Miranda* warnings are required any time a police officer shows a suspect evidence of a crime.

invoking an incriminating remark." Pet., App. 12a-13a. In *Innis*, this Court noted that while the definition of interrogation focuses primarily upon the perceptions of the suspect, rather than the intent of the police, "[t]his is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to have that effect." 446 U.S. at 301, n.7. Thus, it was entirely proper for the Court of Appeals to consider Officer Whaley's intent in determining whether the officer should have known that his words and actions were reasonably likely to elicit an incriminating response.[3]

Mr. Drury had been brought to the police station for the express purpose of questioning, and he had been told so by Officer Whaley. Displaying the tire iron and the stolen magazines for Mr. Drury to see and telling him that the items would be processed for fingerprints was the functional equivalent of saying to him, "See for yourself the evidence we have against you. If your fingerprints are on them, you may as well tell me now. What do you have to say?" It is obvious, as the Court of Appeals concluded, that Corporal Whaley should have known that his words and actions were reasonably likely to elicit an incriminating response.

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[3]In *Innis*, this Court observed that "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." 446 U.S. at 301 n.7. In its petition, the State does not dispute the Court of Appeals's conclusion that Corporal Whaley intended to elicit an incriminating statement from Mr. Drury. At no stage in this case has the State offered any other reason why Corporal Whaley would place the tire iron and stolen magazines in front of Mr. Drury and tell him that they were going to be sent off for fingerprinting.

II. THERE IS NO CONFLICT AMONG LOWER COURTS AS TO THE APPLICATION OF *INNIS*.

The State does its best to manufacture "a serious conflict" in the rulings of federal and state courts in cases where a suspect was either shown or informed of evidence of a crime. Pet.16-21. There is, however, no such conflict.

As the Fourth Circuit stated in *United States v. Payne*, 954 F.2d 199, 203 (4th Cir. 1992), "[t]he inquiry mandated by *Innis* into the perceptions of the suspect is necessarily contextual ... and whether descriptions of incriminating evidence constitute the functional equivalent of interrogation will depend on circumstances that are too numerous to catalogue." The fact that in some cases showing or informing a suspect of evidence of a crime has been deemed to constitute the functional equivalent of interrogation, and in other cases it has not, is not due to any conflict in the lower courts as to the meaning or application of the *Innis* standard. Rather, it is due to the fact that the factual circumstances of each case are different.

Moreover, in each of the cases cited by the State, "a suspect either was shown *or* was informed of evidence of a crime." Pet.16 (emphasis added). Here, as the Court of Appeals noted, Officer Whaley "did not merely place the tire iron and stolen magazines before [Mr. Drury]. The officer told petitioner that they were going to process the items for fingerprints." Pet., App.11a. In none of the cases cited by the State was the suspect told that he was being brought in for questioning and then confronted with evidence of a crime and told that the evidence would he processed for fingerprints. In short, there is no conflict in the rulings of federal and

state courts and no conflict between those rulings and the decision of the Court of Appeals of Maryland in this case.[4]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Stephen E. Harris
Public Defender

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Stacy W. McCormack
Assistant Public Defenders

Counsel for Respondent

*Counsel of Record

June 27, 2002

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[4]The State also suggests that the "somewhat ambiguous language" in *Innis* concerning the relevance of the officer's intent has led to "some confusion" in the lower courts and cites three law review articles that offer their own interpretations of the *Innis* test. Pet.11-14. The State cites no case in which a court complains of any such ambiguity or confusion. In any event, under any of these interpretations, Corporal Whaley's placing the tire iron and stolen magazines in front of Mr. Drury and telling him that the items were going to be processed for fingerprints, after having told him that he was being brought in for questioning, is the functional equivalent of interrogation.

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Respondent	*	No. 01-1774

* * * * * * * * * *

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CERTIFICATE OF SERVICE

I, Howard Mark Colvin, a member of the Bar of this Court, hereby certify that on the 27th day of June, 2002, three copies of the Motion for Leave to Proceed *In Forma Pauperis*, Affidavit in Support of Motion to Proceed *In Forma Pauperis*, and Brief in Opposition to Petition for Writ of Certiorari were served on counsel for Petitioner by depositing them in the United States mail, with first-class postage prepaid, to Gary E. Bair, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 17th Floor, 200 Saint Paul Street, Baltimore, Maryland 21202. I further certify that all parties required to be served have been served.

Howard Mark Colvin